ISS Cooperation: Recent Developments in Rule-Making

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The recent changes

Since preparations for utilisation of the International Space Station (ISS) are now fully under way, the cooperation's management bodies established pursuant to the Memoranda of Understanding (MOUs) linking NASA and each of the other Cooperating Agencies, have started to take decisions and develop detailed rules that affect the rights and interests of all players in the cooperation, including users and the Agencies, thus becoming the forums for developing far-reaching rules.

Until the adoption of the Code of Conduct for the ISS crew on 15 September 2000 by the Multilateral Coordination Board (MCB), the rule-making process for all aspects of the cooperation was based on high-level international negotiations between the Partner States or Partners, on the one hand, and the Cooperating Agencies, on the other, the latter also being referred to as 'the Partners'. These negotiations have produced legal instruments which have been published and also posted on the Internet, and can therefore be consulted by anyone who is interested. Recent developments have shown that responsibility for rule-making on ISS cooperation is shifting from the relatively self-contained environment of international negotiations to a broader base that is more difficult to control.

These recent developments have a number of practical consequences. Firstly, the Agencies' representatives on the various bodies directly engaged in the rule-making process are now more numerous and they are meeting more often than during the IGA (International Governmental Agreement) and MOU negotiations, not to mention frequent changes in personnel assigned to these tasks. There is therefore a strong possibility that the scope of the original ISS rules will be somewhat broadened over time, because of the multiplicity of interpretations and applications.

Secondly, there is no systematic exercise under way within the partnership to decide on consistency between the rules being developed in the various cooperation bodies, compared not only with one another but also with the original prescriptions of the IGA and MOUs. It has to be realised that some rules developed in the Operations Panel and User Operations Panel (SOP/UOP) may also be taken up in a different form in the Multilateral Crew Operations Panel (MCOP), for example, because there will obviously be some level of interaction between the handling of payloads and astronaut activities.

Thirdly, no principles or organisation have yet been agreed for ensuring systematic and formal notification of the detailed rules being developed by all the cooperation bodies, not only among the Partners, but also internally to the different services concerned in the Cooperating Agencies. Notification of new rules within the partnership, to ensure transparency in their application among other things, is obviously imperative because the rights and interests of third parties, essentially the users, will be affected on a daily basis by these new rules, through the contractual relationships to be established between the Agencies and users.

Fourthly, the inadequate level of publicity for new rules outside the partnership may make it difficult for scholars to carry out research using original material on any given subject, which often might have implications far beyond ISS cooperation. In fact, there will probably not be a complete lack of external publicity about new rules, but rather a lack of consistency in practice since the Cooperating Agencies have a wide variety of policies and practices in this regard, and also because the legal regime governing public access to information differs from one Partner State to another.

The Cooperating Agencies have discussed the possibility of giving in the future a legally-binding status, with appropriate formal publicity, to a number of texts developed through dedicated Partners' task forces or ISS management bodies, when such texts affect the rights and obligations of the ISS Partners or individuals. As the expression 'implementing

arrangement' is not defined strictly in the IGA, this could provide the possibility to include all 'legally-binding' texts in a new category of ISS implementing arrangements. Until now, only bilateral barter arrangements have been characterised as 'implementing arrangements' and concluded in a more formal manner. However, because of internal requirements making it somewhat difficult for a number of Cooperating Agencies to conclude a legally-binding document on their own, they have decided that a number of documents, such as almost all of those described below, will be applicable merely as a 'process' or as 'guidelines' complementing obligations contained in the IGA and MOUs. This refers to documents laying down a course of action to be put into operation straightforwardly by the Cooperating Agencies, without necessarily generating rights and obligations in international law.

Arrangement on life-sciences flight experiments on board the ISS

We are currently seeing significant interest from existing space groups working in various fields of research in organising their ISS utilisation. The question of whether utilisation of the Station is already fully covered by the Space Station Intergovernmental Agreement (IGA) and the MOUs has been asked on numerous occasions by potential ISS users. It is clear that both the IGA and the MOUs contain a number of overarching rules outlining how ISS utilisation rights will be apportioned, and otherwise organised and controlled, between the Partners. It is also clear that whenever a Partner decides to share its own utilisation rights in a cooperative framework with other Partners under the IGA and MOUs, the actual cooperation contemplated for such utilisation will be over and above its existing obligations under the IGA and MOUs, and will therefore entail new commitments, and thus new arrangements.

The International Space Life Sciences Working Group (ISLSWG) is promoting the adoption by the partners of a framework arrangement that will outline the basic rules, including the respective parties' responsibilities, for conducting life-sciences experiments on board the ISS. The ISLSWG is a body established a number of years ago to conduct research in that field onboard the US Space Shuttle and is composed of representatives not only from the ISS Cooperating Agencies, but also from European national space agencies such as CNES and DLR. The understanding is that such a framework arrangement would serve as an 'umbrella' for a series of letter arrangements (i.e. additional arrangements in a simplified format), each to be concluded over the years and spelling out more precisely the details of specific experiments.

Under the draft arrangement finalised in recent weeks, four of the five ISS Cooperating Agencies (the Russian Space Agency having chosen not to join the others in this exercise), as Parties to this arrangement, have agreed to:

– use consistently the ISLSWG-defined process for the advertisement of opportunities, review

Figure 1. The in-orbit configuration of the International Space Station in December 2001

Figure 2. ESA Astronaut Claudie Haigneré at work on the ISS in October 2001

of proposals and selection of life-sciences experiments
- make available to the international life-sciences research community their life-sciences hardware and utilisation resources
- share the cost of common activities conducted for the purpose of executing the international life-sciences research programme, such as the administration of the peer-review process.

Obviously, this approach could be used for other fields of ISS utilisation in the future.

Guidelines on commercial activities pertaining to the ISS

Since December 2001, the ISS Cooperating Agencies have held discussions on several occasions to develop a text for guidelines applicable to commercial activities pursued within the framework of the ISS programme. These activities could be defined as: (a) the use of all elements of the ISS, including provision of flight opportunities to space tourists, and (b) a number of activities conducted on Earth for exploiting the overall image of the ISS, such as advertising, merchandising and sponsorship, for the purpose of collecting revenue that could then be spent on ISS utilisation.

From the reading of the draft guidelines finalised by the Multilateral Commercial Group (MCG) in March 2001, one can conclude that the drafters have been remarkably prudent. They have recognised, to all intents and purposes, that commercial activities in the various fields shall be 'promoted and encouraged' and that existing rules, i.e. in the IGA, the MOUs and the Crew Code of Conduct, shall be applied whenever relevant to ISS commercial activities. This prudence could be explained by two factors: (a) the fact that utilisation of the ISS is considered under the IGA as a right that could be freely exercised, and hence the reluctance to accept new impediments, and (b) the significant difference existing between the Partners' markets for both conventional (utilisation-related) and non-conventional (i.e. image-related) ISS commercial activities and therefore the need to not jeopardise the future prospects for extra revenues.

The positive side of the exercise having resulted in these guidelines is that the Partners have put on paper their basic understandings of the way in which ISS commercial activities should be carried out, thus providing a first version of a

document that could gradually be expanded and improved. This is particularly important with regard to the non-conventional activities for which the Cooperating Agencies have accepted: (a) to develop a ISS global brand management plan, preferably before the end of 2002, and (b) to limit themselves to the promotion of their own contributions to the ISS, and therefore not use the global ISS image in their commercial promotion activities before the completion of the above-mentioned plan.

Process for the involvement of non-Partner entities in the ISS Programme

The Cooperating Agencies worked throughout 2001 to develop a process, finally approved in March 2002 by the MCB, for implementing Articles 6.4 and 9.3(a) of the IGA pertaining to non-Partner participation in ISS cooperation. The main objective of these provisions is to provide all Partner States with the occasion to assess the requests, primarily from a 'foreign-policy standpoint', for participation in ISS activities of States, or agencies or private entities or individuals of States, other than those having signed the IGA. It is understood that all other technical and programmatic aspects, such as safety implications, should generally be handled through the ISS management bodies in due time.

One of the time-consuming issues was to determine whether a strict interpretation of the IGA would make it necessary to request all Partners' concurrence or consensus only when contemplating 'the use of a user element' (i.e. laboratory) by a non-Partner. Finally, the Cooperating Agencies agreed on a broad interpretation of the IGA which would make it necessary to request consensus or concurrence by all Partners regarding use of any element, whether a user resource or another element of the ISS, by a non-Partner, including the presence of a non-Partner's spaceflight participant onboard the ISS. They also agreed that there was a need to provide for a time-limited ad-hoc process, i.e. with strict specific delays for all Partner States to provide an answer, because of: (a) the burden and extra costs involved, and the corresponding contractual uncertainties, for the sponsoring Cooperating Agency, and (b) the hope that the processing of consensus/concurrence requests should become a fairly routine matter over the years, and such processing should therefore be both simple and transparent.

Criteria for the selection of ISS crew members

In response to the difficulties encountered by the partnership during preparations for the flight of the first space tourist using the Russian Soyuz vehicle, the American Dennis Tito, the Cooperating Agencies' representatives meeting at the MCOP have developed a document entitled: 'Principles regarding processes and criteria for selection, assignment, training and certification of ISS crew members', which became effective in November 2001. This document addresses such matters as suitability criteria, including medical, behavioural and linguistic aspects, the process for the assignment of crew members to a specific flight, the requirements for training and the certification of flight-readiness.

It is worth mentioning that, for the first time, a document developed multilaterally establishes two categories of astronauts, the professional astronaut and the spaceflight participant, the latter being an individual assigned for a single mission under a short-term contract concluded with the sponsoring agency providing the flight opportunity. The document indicates that both categories of astronauts could be considered for an Expedition Crew flight opportunity, i.e. those long-term flights accruing to the Partners by virtue of their participation in the cooperation pursuant to the IGA and MOUs, or a visiting crew flight opportunity, this being a short-duration mission including a sojourn onboard the ISS. Clarification of the selection criteria among the Partners through the drawing up of the above document contributed significantly to the success of the flight of the second space tourist, the South African Mark Shuttleworth, in April/May 2002.

Conclusions

The interests of the ISS users, whatever their fields of activity, are likely to be at the heart of the rule-making process for ISS cooperation for the foreseeable future. The main challenge for the ISS Partners is to streamline and publicise the various sets of rules – those already existing and those still being developed – in such a way as to make them transparent and easily understandable to all concerned. Also, there will be a significant benefit in ensuring over time the legally binding character of the various rules, within the meaning of that expression in the ISS partnership. This will contribute to the establishment of greater legal certainty when proposing to potential users a series of prescriptions developed by the Partners which are bound to affect the rights and interests of those users. esa